ARBITRAL TRIBUNAL FOR DISPUTE OVER INTER-ENTITY BOUNDARY IN BRCKO AREA, FINAL AWARD

ARBITRAL TRIBUNAL FOR DISPUTE OVER INTER-ENTITY BOUNDARY IN BRCKO AREA

The Federation of Bosnia and Herzegovina

v. Arbitration for the Brcko Area

The Republika Srpska

FINAL AWARD

5 March 1999

Appearances:

For the Federation of Bosnia and Herzegovina

Frank McCloskey
Edward O. Delaney
Mark J. Dinsmore
Barnes & Thornburg

Jay D. Zeiler

Akin, Gump, Strauss

Hauer & Field

For the Republika Srpska Nikola Kostich Styler, Kostich, LeBell

Dobroski & McGuire

Dr Radomir Lukic

TABLE OF CONTENTS

I. THE ISSUE BEFORE THE TRIBUNAL

II. SUMMARY OF CONCLUSIONS

III. THE NEED FOR CHANGE IN GOVERNANCE
- A. The Practical and Political Forces Impeding Two-Way Returns
- B. The Discouragement of Serb Departures from Brcko
- C. Discouragement of Bosniac and Croat Returns to Brcko
- D. The Failure to Facilitate Local Multi-Ethnic Government

IV. THE BASIC STRUCTURE OF THE NEW DISTRICT

V. RECOMMENDATIONS TO THE HIGH REPRESENTATIVE AND THE INTERNATIONAL COMMUNITY

VI. PROTECTION OF THE VARIOUS INTERESTS INVOLVED
- A. Interests of the Republika Srpska
- B. Interests of the Federation
- C. Interests of the International Community

VII. LEGAL VALIDITY OF THE DISTRICT PLAN

FUTURE ADJUSTMENTS IN THE ANNEX PROVISIONS

IX. PENALTIES FOR NON-COMPLIANCE

X. AUTHENTICITY

ANNEX

FINAL AWARD

I. THE ISSUE BEFORE THE TRIBUNAL

1. As explained in the Tribunal's prior rulings1, at the 1995 Dayton Conference those representing the two sub-state entities of Bosnia and Herzegovina ("BiH") — the Federation of BiH and Republika Srpska ("RS") — were unable to reach agreement as to which entity should control the Brcko area in northeastern Bosnia. Failing agreement, the Dayton map in effect placed the area in temporary RS custody, but it was agreed by all parties that it would be left to this international arbitration tribunal to decide where to place responsibility for the future governance of the Brcko area.

2. The Tribunal's Award of 15 February 1997 explained in considerable detail the wide latitude necessarily enjoyed by this Tribunal in fashioning a remedy for this extremely troublesome dispute. See Award 38. The parties themselves struggled with the issue through the 21-day Dayton Conference, and the negotiations on the Brcko issue finally broke down as the Conference was about to end. In a sense, therefore, this final phase of the arbitration is the final phase of the Dayton process itself. In order to complete that process, the parties (including BiH and both entities) explicitly agreed that the arbitral decision reached by the Presiding Arbitrator "shall be final and binding" and that the parties "shall implement it without delay." See Dayton Annex 2; Award 5.

3. It is generally agreed that there are three basic alternatives. One is to transfer Brcko to the Federation, which claims the right of governance on the essential grounds (a) that historically the Brcko municipality has been predominantly Bosniac and Croat, as well as vital northern gateway between central Bosnia and Europe, (b) that it would be unconscionable for the RS to retain exclusive possession of a city which the Serbs captured and "ethnically cleansed" during the war, and (c) that the only just result would be to award the Brcko area to the Federation.

A second alternative is to confirm the RS's claim to the right of permanent governance

on the essential ground that, whatever its history, the Brcko corridor along the Sava River provides a vital strategic connection between the two halves of the RS. It claims that any change in its exclusive possession would be inconsistent with the alleged principle of territorial continuity and the Dayton objective of allowing the RS to control 49% of BiH territory.

Third, the Tribunal's prior rulings have suggested the possibility that the result most consistent with Dayton's objectives might be to remove Brcko from the exclusive control of either entity and place its governance in the hands of an independent District government under the exclusive sovereignty of BiH. See Award 103-04; Supp. Award 27.

4. In order to move this dispute forward toward a just and equitable solution consistent with the objectives of Dayton, the Tribunal's two prior decisions (a) have created an international supervisory regime in the Brcko area with instructions to move the parties toward compliance with Dayton, and (b) have narrowed the issues and focused on one over-riding question. Specifically, as a result of the 1997 and 1998 arbitral hearings the Tribunal found that during its post-Dayton custody of Brcko the RS had engaged in "systematic non-compliance with (indeed, defiance of) the Dayton Accords in the Brcko area." Supp. Award at 21. The 1998 ruling explicitly forewarned the RS that at a final round of arbitral hearings, to be

held at year end, the RS would have to carry "the burden of demonstrating very clearly, that it has truly reversed and committed itself to apparently permanent program of full Dayton compliance," including specifically a demonstration of "significant new achievements in terms of returns of former Brcko residents" and "strong support for the multi-ethnic governmental institutions" then being developed under international supervision. The Tribunal expressly stated that at the 1999 arbitral hearings it would "expect to receive from the RS evidence displaying a very vigorous and consistent program of correction and compliance throughout 1998" and that, absent such a showing, the Tribunal would be compelled to "diminish the RS's position in the Brcko area." Thus the basic issue before the Tribunal now is whether the RS made the necessary showing during hearings held in Vienna in the period 8-17 February 1999.

5. The time is ripe for a final decision as to the future governance of Brcko. Both entities have urged the Tribunal to make a final ruling now. Moreover, the point was made at the recent hearing that, despite Dayton's goal of having displaced persons ("DPs") return to their original homes, Serb DPs in Brcko are becoming ever more "cemented" in position with the passage of time, that Bosniacs and Croats from Brcko are beginning to abandon hope of returning to Brcko, moving off to other areas instead, and that any further delay in the arbitral process will continue to reduce the chances of ethnic reintegration in the Brcko area. The Supervisor has also emphasized that until a final decision is made, it will be virtually impossible to persuade either donor governments or private investors to fund the badly needed economic revitalization of the depressed Brcko area. Finally, it is likely that any further postponement of a final decision in this matter – the only unresolved issue left over from Dayton – will impede the development of BiH as a whole.

II. SUMMARY OF CONCLUSIONS

6. During the 1999 Vienna hearings the RS failed to make the kind of showing required by the Supplemental Award of 15 March 1998. Instead of suggesting "a very vigorous and consistent program of correction and compliance [with Dayton and the prior arbitral rulings] throughout 1998," the evidence showed instead (as more fully described below) that throughout 1998, notwithstanding the good intentions of RS Prime Minister Milorad Dodik, the Serb political leaders exercising immediate local control in Brcko – especially individuals aligned with the anti-Dayton SDS and SRS parties both locally and entity-wide – tolerated and apparently encouraged a significant level of obstruction against the attainment of Dayton's and the Tribunal's objectives, particularly as against the goals of (a) encouraging and enabling displaced persons and refugees to return to their pre-war homes, (b) helping to develop democratic multi-ethnic institutions, and (c) cooperating with the international supervisory regime.

7. The Tribunal has further concluded that it is very unlikely that the level of local obstructionism will effectively diminish so long as anti-Dayton political elements-particularly the SDS and SRS parties led by newly-elected RS President Nikola Poplasen – are allowed to remain dominant in that portion of the Brcko area that is in RS custody. Indeed, if pro-Dayton elements had been able to implement their programs in the Brcko area during the last year, the Tribunal's present decision to require a change of government might not have been necessary but SDS/SRS intransigence has left the Tribunal with no choice.

8. With all parties in vigorous agreement that the international supervisory regime must continue in force indefinitely in the Brcko area, it is appropriate to allow the necessary change to be brought about on an orderly schedule, thus avoiding the kind of abrupt change that may unnecessarily aggravate the situation. The Supervisor will have responsibility for scheduling and implementing the changes described below over the next several months, and severe penalties will be imposed for any failure to cooperate with his implementation progam, including the ultimate remedy of placing Brcko in the exclusive control of one entity or the other. See 65-68, infra. In the meantime, pending implementation of the District plan by the Supervisor, the Inter-Entity Boundary Line ("IEBL") will continue in place without change, and existing laws and governmental arraignments (including those related to payment of salaries to employees) will remain in force. See 39, infra.

9. Pursuant to the commitments made by BiH and both entities to "implement without delay" the Tribunal's decision, upon the effective date to be established by' the Supervisor each entity shall be deemed to have delegated all of its powers of governance within the pre-war Brcko Opstina to a new institution, a new multi-ethnic democratic government to be known as "The Brcko District of Bosnia and Herzegovina" under the exclusive sovereignty of Bosnia and Herzegovina. The legal effect will be permanently to suspend all of the legal authority of both entities within the Opstina and to recreate it as a single administrative unit.

10. As an institution existing under the sovereignty of Bosnia and Herzegovina, the new

District government will be subject to the powers of the common institutions of BiH as those powers are enumerated in the BiH Constitution. All other powers of governance within the Brcko Opstina. having been delegated by the two entities, will be exercised exclusively by the District government, subject, however, to supervised coordination with the two entity governments. See 43, infra. Responsibility for overall coordination. and for issuing any needed directives to ensure that the entities fulfill their obligations with respect to the new District, will be that of the Supervisor, who may delegate that responsibility to an appropriate BiH institution. The entities are hereby ordered to implement without delay any such directive, regulation or order issued by the Supervisor or his delegate. The Tribunal is satisfied that these arrangements are fully consistent with the BiH Constitution. See 58-62, infra.

11. Upon the establishment of the new District, the entire territory, within its boundaries (i.e., the pre-war Brcko Opstina) will thereafter be held in "condominium" by both entities simultaneously: The territory of the RS will encompass the entire Opstina, and so also will the territory of the Federation. Neither entity, however, will exercise any authority within the boundaries of the District, which will administer the area as one unitary government. Existing entity law will continue to apply as appropriate within the District until modified by action of the Supervisor or the District Assembly, and the IEBL will continue to exist within the District until the Supervisor has determined that it has no further legal significance and may cease to exist. See 39, infra. No subdivision of the District on any ethnic basis shall be permitted.

12. Having considered all of the evidence, the Tribunal has concluded that the new District plan will adequately protect the legitimate interests of both of the two entities and those of the international community. See 50-57, infra.

13. The Dayton Accords require that the entities "implement without delay" this "final and binding" Tribunal award. In the event of non-compliance, the Supervisor will have authority to issue remedial orders. In addition. this Tribunal will remain in existence until such time as the Supervisor, with the approval of the High Representative, has notified the Tribunal (a) that the two entities have fully complied with their obligations to facilitate the establishment of the new institutions herein described, and (b) that such institutions are functioning, effectively and apparently permanently, within the Brcko Opstina. Until such notification, the Tribunal will retain authority, in the event of serious non-compliance by either entity, to modify this Final Award as necessary – e.g., by placing part or all of the District within the exclusive control of the other entity.

III. THE NEED FOR A CHANGE IN GOVERNANCE

14. Thanks to the efforts of the Supervisor, who arrived in Brcko in April 1997, progress has been made toward implementation of the Dayton Accords. As the leading example, there is general agreement that through the combined efforts of the High Representative and the Supervisor there has been a great improvement in freedom of movement, in the degree to which citizens of BiH can cross in and out of the RS part of the Brcko area. This has been an important accomplishment, in part because it contributes to the movement of commercial

traffic and the enhancement of the economies of both entities.

15. Some progress has also been made in terms of the establishment of multi-ethnic institutions in Brcko. Most notably, the constant and diligent supervision of the International Police Task Force (the "IPTF") has resulted in the establishment of the only multi-ethnic police force in the RS today. Hopefully other communities in the RS and the Federation will be able to follow suit.

16. On the other hand, with respect to the most important of all of Dayton's objectives – the return of refugees and displaced persons to their homes or origin – the progress in the Brcko area has fallen far short of the basic standard spelled out in Paragraph 21 of the Supplemental Award of 15 March 1998. It is true, thanks almost entirely to the efforts of the international community, that in a narrow sense there has been some success in terms of returns: In the RS-held area south and west of Brcko Grad, Bosniacs and Croats returned in sufficient numbers during 1997 and 1998 to enable RS authorities to claim chat returns to the Brcko area have been greater than in any other RS municipality. But that in a sense is damning with faint praise: That achievement, such as it is, does not demonstrate "a very vigorous and consistent program of correction and [Dayton] compliance."

17. Additionally, as further explained below, local political leaders have seriously obstructed the development of a democratic administration in Brcko.

A. The Practical an Political Forces Impending Two-Way Returns

18. Analysis of Brcko returns must start from the need for two-way returns. After the ethnic cleansing of Brcko during the war, Brcko Grad became essentially l00% Serb, and Serb DPs flocked in to Brcko from other parts of Bosnia and Croatia. The result, today, is that some 26,000 Serb DPs are housed in Brcko, most of them living in apartments and houses that lawfully belong to Bosniacs and Croats who were driven out in the cleansing process. The Supervisor has wisely decided against any wholesale evictions of such people, but as a practical matter a Bosniac family cannot return to its former home in Brcko unless the Serb DP family now living there moves out. In short; until a substantial number of Serb DPs move, thus making housing available to returning Bosniacs and Croats on a two-way basis, Brcko will not return to its multi-ethnic pre-war character.

19. The political realities are that progress toward a two-way return program has been seriously impeded by various anti-Dayton Serb groups, including particularly the Serbian Democratic Party ("SDS") formerly led by Dr. Radovan Karadzic and Momcilo Krajisnik and headquarters in Pale during the war. As previously emphasized by the Tribunal in the Supplemental Award (at 7), a prime goal of SDS – and its hard-line allies in the Serbian Radical Party ("SRS") – has been to maintain the Serbs-only "ethnic purity" of the Brcko region in clear

defiance of Dayton's principal objective. It was the Tribunal's conclusion a year ago that through 1997 SDS officials in Brcko had seriously obstructed the returns process. Id.

20. In light of Paragraph 21 of the Supplemental Award, the question arises: During 1998 did conditions change sufficiently to justify continued RS governance of Brcko? As noted a year ago, in early 1998 there was hope that SDS's hard-line control of Brcko might be dissipated by the arrival of pro-Dayton forces led by (among others) Milorad Dodik, then newly installed as Prime Minister in defiance of the SDS. Unfortunately, although Mr. Dodik made efforts in the right direction during 1998, there is considerable evidence that local SDS forces retained their hold in Brcko throughout the year and prevented pro-Dayton groups, including the so-called Sloga coalition, from effecting real change.

21. It seems reasonably clear that the incumbent anti-Dayton forces in Brcko were encouraged when; five months ago, Nikola Poplasen, a particularly hard-line SRS leader, was elected President of Republika Srpska. Mr. Poplasen has made plain over time that he is a close ally- of the most anti-Dayton champions of Serb nationalism, including Vojislav Seselj (leader of the SRS in the FRY), and that, instead of supporting an independent Bosnia, he favors secession by the RS and a merger with Serbia; he has said that he regards such a merger as "inevitable." In the last five months Mr. Poplasen has worked diligently to preclude Mr. Dodik from continuing in office, thus undercutting compliance with Dayton in the Brcko area. Moreover, only days before the date of this Final Award Mr. Poplasen was quoted in the press as threatening to respond militarily to an adverse ruling in this proceeding, and he has recently refused to comply with the High Representative's decision regarding civilian command authority over RS military forces. These actions have strengthened the Tribunal's conclusion that a change from RS control is essential. Indeed, Mr. Poplasen must take major responsibility for the result being reached in this decision2.

B. The Discouragement of Serb Departures from Brcko

22. Dayton's multi-ethnic objective can be achieved only if responsible officials act in good faith to encourage two-way returns-encouraging those illegally occupying others' houses to exercise their right to return home, vacating the premises for the rightful owners. It is true that Annex 7 of the Dayton Accords provides that the parties are not to "interfere with the returnees' choice of destination," but efforts to encourage DPs to stay where they are and retain property illegally, as distinguished from facilitating returns, are inconsistent with Dayton.

23. The record is clear that during 1998 hard-line SDS officials in Brcko encouraged Brcko's Serb DPs and refugees to stay where they are, whether or not recovery of their own homes elsewhere was a real possibility. Their message has been that it would be dangerous to leave and dilute the existing Serb grip on Brcko Grad. Moreover, this message has been sustained right through the year 1998, despite the Tribunal's clear call, in March 1998, for a new approach.

24. To give a few examples, in July 1998, four months after the Supplemental Award, the SDS-allied Serb Mayor of Brcko made public statement (quoted in RS-controlled media) to the effect that it would be unwise for Serbs to leave Brcko Grad and return to the Federation. In September, two months later, an SDS-allied member of the Brcko Executive Board urged a large meeting of Serb DPs in Brcko to abandon any thought of leaving the area. And at "seminars" for DPs conducted throughout the year local officials spoke primarily in terms of staying in Brcko, in homes belonging to others, rather than encouraging returns. It may also be significant that, although RS authorities-testified that every RS municipality had been directed to prepare a plan for the facilitation of returns, Brcko was one of the few that did not comply with this direction.

25. The failures and obstructions noted above apparently had the desired results. According to UNHCR, more than 7,600 Serbs returned officially to the Federation from various parts of the RS in 1998. Of that group, at least 4,000 Serbs returned to the Sarajevo canton, where approximately 125,000 Serbs lived before the war. But the movement from Brcko to the federation was negligible. Out of approximately 26,000 Serb DPs in Brcko, only 142 Brcko Serb families applied to return to the Federation; and many less actually moved. According to one local Serb official, in the two years,1997-98, only nine Serbs left Brcko to return to the Federation. There is evidence that although there are some 3,500 Serb DP families who came to Brcko from Sarajevo, only 23 have applied for return, and only four have actually moved. In short, it is almost surely the case that the flow of returnees out of Brcko has been very much smaller than it would have been if local officials had sought to comply with Dayton [3].

C. The Discouragement of Bosniac and Croat Returns to Brcko

26. The Supplemental Award of 15 March 1998 emphasizes (at 7) that during 1997 "there was systematic intimidation of any Bosniacs or Croats who explored the possibility of returning to their former homes in the [Brcko] area," the apparent objective being, once again, to maintain the Serbs-only "ethnic purity" of the region. As a result, although some Bosniacs and Croats managed to return to the region during 1997, all such returns were confined to the relatively rural areas south and west of Brcko Grad. No returns were accomplished into the Grad itself.

27. Although the Supplementary Award (at 21) called upon local Brcko authorities to launch "a very vigorous and consistent program of correction" during 1998, something less actually occurred. The intimidation of prospective returnees was not quite as flagrant as it was in 1997, but intimidation continued to occur in various forms throughout 1998. As noted below, although an estimated 9,000 Bosniac and Croat applications for return to Brcko have been filed with appropriate authorities, only a tiny fraction of those prospective returnees have actually moved back.

28. Predictably, there is little hard evidence of official encouragement of intimidation. but the record clearly shows a serious lack of political will to prevent such intimidation from occurring. For example, on 12 separate occasions in 1998 (in Klanac. lvici, Gluhakovac and Meraje) Serb demonstrators gathered to protest returns, harass Bosniac and Croat returnees, and obstruct house-marking by international officials. The evidence suggests that some of these demonstrations were "orchestrated" by hard line groups. Part of this practice involved "thugs" gathering crowds of protesting Serbs together and urging Serb women and children to move to the front, thus discouraging any possible police effort to move against the crowd. Although in each case police arrived at the scene and prevented actual physical harm to the targets, the latter were effectively intimidated, and no one h4s returned to the homes involved. Significantly, no arrests were made.

29. The record also reflects various ethnically-motivated crimes against Bosniacs and Croats, again without any subsequent prosecution. As one example, one of the very few Bosniacs who actually attempted to return to Brcko Grad in 1998 (a former shop-owner who had the courage to bring his wife and daughter with him) suffered a double bombing: a hand grenade was thrown into his shop; another was used to bomb his automobile: no arrests were ever made; and the victim has prudently abandoned his effort to return.

30. As to whether local officials should bear responsibility for the virtual absence of returns to Brcko Grad, one fact stands out from the rest: With great effort Supervisor Farrand has managed to put together a multi-ethnic government in Brcko, with the result that a number of Bosniacs and Croats who have become government officials now have an additional motivation to return to their homes in Brcko Grad (to avoid a long commute), but local Serb officials have simply refused to obey Ambassador Farrand's directions to facilitate returns by these non-Serb officials to their home city.

31. The result is that the volume of returns to the Brcko area actually declined during the last six months of 1998. That fact, standing alone, demonstrates the plain failure of local Brcko officials to meet the standards set out in Paragraph 21 of the Supplemental Award.

D. The Failure to Facilitate Local Multi-Ethnic Government

32. The Supplemental Award (Paragraph 21) called upon local Brcko officials to provide "strong support for the multi-ethnic governmental institutions" being developed under international supervision, but local authorities have plainly failed to obey that direction. In the first place, the very establishment of a multi-ethnic administration was delayed beyond Supervisor Farrand's original December 31,1997 deadline; indeed, it was not finally accomplished until August 1998, after two more deadlines had passed. More troubling, despite a degree of formal or outward compliance with stated requirements for developing such institutions, the actions and attitudes of local leaders have frustrated true multi-ethnic power-sharing – at least until pressed by the international community.

33. The lack of support for the multi-ethnic governmental institutions ranged from minor obstructionism to serious disobedience of orders issued by Supervisor Farrand. With a whole list of such episodes in evidence, we need only note a few examples. Relations between the Mayor (Serb) and the two Deputy Mayors (Bosniac and Croat) were marred by the Mayor's failure to abide by the requirement that the Deputy Mayors countersign letters to the Municipal Assembly and by the Mayor's refusal to allow the Deputy Mayors to place items on the agenda of the Executive Hoard. Serb block voting both on the Executive Board and in the Assembly effectively prevented those bodies from acting on issues that they were required to address by Supervisory orders and this Tribunal's Awards. Local leaders have also prevented ethnic integration in the lower ranks of the Brcko administration. This and other evidence demonstrates a clear pattern of resistance against, not support for, the development of democratic multi-ethnic institutions m Brcko. That fact, standing alone, calls for a change in the governance of Brcko.

IV. THE BASIC STRUCTURE OF THE NEW DISTRICT

34. Having set forth (in Paragraph 9, supra) the Tribunal's critical conclusion that upon an effective date to be designated by the Supervisor – hopefully by 31 December 1999 – a new governmental institution must be created through specified actions by BiH and each of the two entities, we explain below the basic plan for the new "Brcko District of Bosnia and Herzegovina" or (informally) "the District government." As noted in Paragraphs 9 and 10, since the District government will be an institution existing under BiH sovereignty, it will be subject to BiH control in those areas which are the responsibility of the BiH common institutions, and in other respects (subject to needed coordination by the Supervisor between the District and the two entity governments) the District government will operate on a self governing basis.

35. Although the Tribunal is hereby announcing its final decision as to the basic plan for the new District, it may be premature at this point (as explained in Section VIII below) to make final rulings on certain aspects of the new system of government. Those matters are discussed in the Annex to this Award, and interested parties will have a 60-day opportunity to comment on the matters raised by the Annex. All other rulings set forth in this Final Award, however, are final and binding and shall not be the subject of further comment.

36. The basic concept is to create a single, unitary multi-ethnic democratic government to exorcise, throughout the pre-war Brcko Opstina, those powers previously exercised by the two entities and the three municipal governments. The District government shall consist essentially of (a) the District Assembly, a legislative body whose membership will be selected through democratic elections to be scheduled by the Supervisor; (b) an Executive Board, to be selected why the Assembly; (c) an independent judiciary, to consist of two courts, trial and appellate and (d) a unified police force operating under a single command structure with one uniform and badge, with complete independence from the police establishments of the two entities.

37. All interested parties having agreed (as previously noted) that the Supervisory regime established by the Award must continue in existence, the authority and the responsibilities of the Supervisor must now be expanded geographically and augmented as hereinafter provided in this Final Award and The Annex. Supervision shall continue until terminated by the Steering Board of the Peace Implementation Council.

38. The initial new, responsibility of the Supervisor will be to appoint a joint implementation commission to assist him in preparing a new "Statute for District Government" and a detailed plan and schedule for the formation of the District Government. The Supervisor, in his discretion, may decide to select and include within the commission's membership representatives of BiH, the two entities, and the existing Brcko government, and he is encouraged to seek such expert advice as he deems appropriate.

39. The laws presently applicable in the RS portion and the Federation portion of the Brcko Opstina will continue to apply in those areas until such time as the laws have been reviewed and harmonized and approved by the Supervisor or, with his approval, by the new District Assembly. When the Supervisor concludes that the IEBL has ceased to have any legal significance within the District, it will cease to exist within the District. Subject to further order of the Supervisor, existing governmental arrangements shall continue in force pending formation of the District government. In addition, the current obligations of the entities with respect to such entitlements as salaries and pensions shall remain effective until otherwise directed by the Supervisor. BiH, the entities, and existing municipal governments will take no actions that will impair the establishment of the District.

40. The Supervisor's implementation plan must provide for severing all connections between the entities and the new District police force, which will need to be expanded and readied to exercise its law enforcement responsibilities throughout the Brcko Opstina. Except as explicitly authorized by the IPTF or the Supervisor in written regulations, no entity police or security officials may enter the District in any of official capacity, and no District police personnel will take instruction or direction from any representative of either entity or any political party.

41. From and after a date to be established by the Supervisor, neither entity shall allow any of its military or other armed forces or supporting facilities to be based in the District. Recognizing that it may be desirable to allow a gradual phasing out of any existing military presence within the Brcko Opstina, the Supervisor is authorized and directed to work with SFOR on the scheduling of the gradual withdrawal of military forces and military facilities. The international community is encouraged to provide financial assistance to the entities in effectuating such relocations.

42. The Tribunal recognizes that from time to time the RS may have a legitimate need to move military forces and equipment through the District, and the existing SFOR regulatory regime, under which such transit may occur with SFOR permission, will continue in place. Thereafter any such transit will take place only in accordance with the laws of BiH and the

District.

43. The Tribunal recognizes that there will be a need for coordination among the governments of BiH, the two entities, and the District on a variety or issues including questions of sharing expenses and revenues. The Supervisor will have the responsibility to effect such coordination and, failing agreement, to direct the entities to take appropriate action with respect to Brcko. The Supervisor may, if he wishes, delegate this responsibility to an existing BiH institution or to a new institution established for that purpose. The entities are hereby ordered to comply with and implement without delay any such coordination directive. regulation, or order issued by the Supervisor or his delegate.

44. It is the Tribunal's expectation that, with a greater degree of democracy in the area and a lessening of anti-return propaganda and intimidation, which must be accompanied by increased returns-facilitation by the Federation, the existing prejudices of Brcko's Serb DPs against return to their original homes will be alleviated and that the flow of DPs out of Brcko will increase, thus facilitating returns both ways. In addition, there is reason to believe that, as DPs from both entities increasingly return home, there will be a dilution of hard-line nationalistic attitudes in both entities, thus reducing tensions overall in Bosnia and Hercegovina4 .

45. As to the wisdom of the new District approach, the Tribunal is encouraged by the fact that a number of thoughtful people from all ethnic backgrounds in Bosnia and Herzegovina have enthusiastically supported this approach. The belief that Brcko will best be served by the new District plan is shared by respected jurists, academics, and members of moderate political parties representing all three major ethnic groups.

46. While leaving scheduling matters to the Supervisor, it is the Tribunal's hope and expectation that the various components of the new District government will be operational, for the most part, by 31 December 1999 or within a few months thereafter.

V. RECOMMENDATIONS TO THE HIGH REPRESENTATIVE AND THE INTERNATIONAL COMMUNITY

47. The Tribunal notes that in terms of DP and refugee returns Dayton's objectives can be achieved in the Brcko area only if a genuine effort is made to remove all obstacles to, and to provide serious encouragement for, returns to the Federation by Serb DPs presently residing in Brcko. The Sarajevo Declaration of December 1997 called for major achievements in this direction, as did Paragraph 22 of the Tribunal's Supplemental Award, but UNHCR has reported that the Federation has fallen far short of the stated goals. Accordingly, whether or not the Tribunal is in a position to direct such actions on the part of the High Representative, it takes the liberty of strongly recommending to him that he take further steps, as appropriate, to cause the Federation (a) to provide Brcko's Serb DPs with expedited, priority assistance in

repossessing their properties within the Federation, (b) to provide such persons with employment and security following their returns; (c) to ensure returning Serbs a fair measure of local political control and economic participation in relevant Federation areas, including particularly Sarajevo Canton and Ilias, Ilidza, Vogosca, and Visoko Municipalities; and (d) to reduce the presence of Armija and HVO forces in areas where they may be perceived as a threat to Serb returns, including Gradacac, Srebrenik, Lukavac, Orasje, Jajce, and Drvar Municipalities. Because the largest single group of Brcko Serb DPs is from the neighboring Posavina region, the Tribunal strongly recommends that the High Representative and the Supervisor work together to eliminate obstructive behavior by local officials against such returns. It is further recommended that if the Federation tails to facilitate Serb returns to Sarajevo, the High Representative consider undertaking additional measures of international direction in the formerly Serb suburbs of Sarajevo.

48. In the event that the High Representative imposes additional requirements upon the Federation in aid of encouraging Serb return from Brcko, the Supervisor is authorized to take Federation compliance with such requirements into account (along with all other factors that he may consider relevant) in scheduling the establishment of the District Government.

49. It being clear that one of the major causes of tension in the Brcko area is its general economic depression and high rate of unemployment, all relevant international institutions are strongly encouraged to support and assist the Supervisor in his efforts to revitalize the District's economy in the interests of reducing tensions in the area and promoting the cause of international peace. Financial support from international donors such as the European Union, the World Bank, the United States, and the European Bank for Reconstruction and Development will be particularly important to implement this plan, and they are respectfully urged to provide the Supervisor with all necessary support in his economic revitalization efforts.

VI. PROTECTION OF THE VARIOUS INTERESTS INVOLVED

50. In reaching its decision the Tribunal has considered the interests of the two entities as they have been explained by counsel during the several hearings. It is the Tribunal's conclusion that the new District plan will adequately protect such interests.

A. The Interests of the Republika Srpska

51. In the course of prior hearings the RS has identified three interests that allegedly deserve protection. First, it is alleged that the Dayton Accords recognize a legal or equitable principle-the so-called principle of "territorial continuity" – which, if applied by this Tribunal, could require that the RS-held Posavina corridor as shown on the Dayton map be allowed to

continue in RS custody. As noted in the Award, however, Dayton's conferment of arbitral authority to sever the corridor if so required by applicable principles of law or equity demonstrates that the parties at Dayton did not intend that any principle of "territorial continuity" be treated as controlling over other considerations. See Award 82. Moreover, although under the present decision the Brcko area will be administered on a self-governing basis by the District government, RS territory as shown on the Dayton map will remain continuous. See 11, supra.

52. The RS continues to argue, as it has in the past, that one of Dayton's goals was to insure that in the post-Dayton world RS territory would include at least 49% of all of BiH. Nothing in this decision, however, will diminish that territorial share. Indeed, since the amount of territory added to the RS under the "condominium" arrangement will be greater than that added to the Federation, the RS' percentage share is being increased by this Award.

53. The RS once again argues that it needs to retain authority over the corridor for the "strategic" purpose of allowing movement of its armed forces from one part of the RS to the other, but there are at least three answers to that contention. First, whenever the RS has a legitimate need to move military forces through the District, it need only make application to SFOR for an appropriate transit permit. Second, so long as Bosnia and Herzegovina remains a unified and peaceful state as provided at Dayton, the RS has no military or "strategic" need for an RS-controlled corridor. Third, and most importantly, apart from military transit, the RS and its citizen will continue to have an absolutely unrestricted right to move freely east and west through the District – a right that will be vigorously enforced by the new multi-ethnic and democratically oriented District police force. Thus the desired corridor will remain open for all legitimate purposes, and all legitimate "territorial continuity" will be preserved.

B. The Interests of the Federation

54. Various interests of the Federation have been adequately discussed in the Award and the Supplemental Award. The dominant interests that remain open for discussion are (1) the Federation's political and social interest in insuring that the portion of the Brcko Opstina that lies north and east of the IEBL i.e., the RS portion of Brcko) will once more be restored as a multi-ethnic community under a multi-ethnic democratic government, thus allowing Bosniac and Croat DPs who were forced out of Brcko during the war to return to their former homes, and (2) the Federation's economic interest in insuring that the Brcko Opstina will be completely open to Federation traffic, north and south, thus insuring the preservation of a northern gateway to Croatia and Europe.

55. We believe that it is clear, from prior discussion, that both interests will be protected under the District plan.

56. As to the Federation's arguments in favor of a transfer of the RS portion of the Brcko

Opstina to the Federation, such arguments are not without force. Indeed, had Prime Minister Dodik not newly appeared on the scene in early 1998, the Tribunal might well have made the requested transfer. See Supp. Award at 8-12. Nonetheless. it is incumbent upon the Tribunal to consider how well, during the rest of 1998, the Federation shouldered its responsibility for ensuring that those Serb DPs who wished to return to their former homes in the Federation were encouraged to do so. Since in this respect the Federation's performance in 1998 was less than satisfactory (as conceded by various Federation representatives), the Tribunal deadlines to place Federation officials in exclusive control of ethnic reintegration in Brcko, with or without supervision. The more equitable and wiser course, we believe, is to place such responsibilities in the hands of a new multi-ethnic democratic District government under international supervision.

C. The Interests of the International Community

57. At this point, with significant progress having been made in terms of freedom of movement between the two entities, the international community's most urgent objective is to maximize the freedom of refugees and displaced persons to return to their original homes in BiH. As several witnesses made clear in earlier hearings, "there is little hope for peace" until "the unrest and discontent" arising from displacement have been alleviated through an effective returns program. See Award 85. The Tribunal has concluded that in this respect the cause of peace will be most effectively advanced by keeping Brcko returns out of the exclusive control of either of the two entities.

VII. THE LEGAL VALIDITY OF THE DISTRICT PLAN

58. The Tribunal is satisfied that all aspects of the plan are defensible as being consistent with and not disruptive of the Constitution of BiH as adopted at Dayton.

59. The District plan is consistent with the constitutional requirement that Bosnia and Herzegovina consist of two, and no more than two, Entities. See Const. Art. I(3). Since all territory within BiH will continue to be assigned to one entity or the other or both, it will continue to be the case that BiH consists only of the two entities.

60. As to the institutional adjustments herein described, Article III(5)(a) explicitly authorizes BiH to "assume responsibility for" such matters as "are necessary to preserve the sovereignty territorial integrity, political independence and international personality of Bosnia and Herzegovina." This provision is also explicit that "[a]dditional institutions may be established as necessary to carry out such responsibilities." As has been clear since Dayton, the instant dispute that the potential to ignite efforts to destroy Bosnia through secession or renewed hostilities. In these circumstances, the invocation of Article III(5)(a) is both appropriate and necessary, and the creation of the new District as herein described is constitutionally authorized.

61. The same is true of the requirement that, as of the effective date designated by the Supervisor, both entities shall be deemed to have delegated all of their powers of governance in the prescribed area to the District government. Like BiH, both entities are bound by Dayton Annex 2 to "implement" the Tribunal's direction that such a delegation be made5 . All powers thereafter exercised by the District will, of course, continue for constitutional purposes to be "governmental functions and powers. . . of the entities." See BiH Constitution Article III(3)(a).

62. Given the clear meaning of Dayton Annex 2 as to the "binding" effect of this decision upon BiH and both entities, their respective judicial and parliamentary institutions are equally bound to honor and implement the Tribunal's rulings.

VII. FUTURE ADJUSTMENTS IN THE ANNEX PROVISIONS

63. The Tribunal recognizes that at the hearings of 8-15 February 1999 the two parties did not have an opportunity to examine and comment upon the provisions of the Annex (since it was not yet available). It is thus possible that, based on experience, the two entity governments and other interested parties may be able now to identify parts of the Annex that are not realistic or which in fairness ought to be improved. Accordingly, all such parties shall be afforded an opportunity to provide written comments on the Annex provided that such comments are received no later than 60 days following the date of this Final Award. Following receipt of any such comments the Tribunal will either keep the Annex as is or make modifications if appropriate. All such written comments should be directed to the terms of the Annex and not reargue other issues resolved in this Final Award.

64. The Tribunal strongly urges BiH and both entities to consider, as soon as possible, whether they might not be better off to engage in inter-party negotiations as to the final terms of the Annex, rather than leaving the final formulation to the Tribunal. If the parties would consider it useful, the Tribunal would be happy to make its best efforts to enlist an international intermediary to assist in negotiating terms satisfactory to both sides.

VIII. PENALTIES FOR NON-COMPLIANCE

65. The Dayton Accords require that the entities "implement without delay" this "final and binding" Tribunal Award, and the District plan cannot succeed without cooperative compliance by both entities. Therefore, serious non-compliance will be subject to penalties in the form of additional relief.

66. Given the breadth of the powers enjoyed by the Supervisor (until the supervisory regime has terminated by the PIC Steering Board), the Supervisor may decide, in his

discretion. To formulate penalties to be imposed by supervisory order.

67. To provide the Supervisor with an alternative remedy, this Tribunal will retain jurisdiction over this dispute until such time as the Supervisor, with the approval of the High Representative, has notified the Tribunal (a) that the two entities have fully complied with their obligations to facilitate establishment of the new institutions herein described, and (b) that such institutions are functioning, effectively and apparently permanently, within the Brcko Opstina. Until such notification, the Tribunal will retain authority to modify this Final Award as necessary in the event of serious non-compliance by one or the other of the entities.

68. Without limiting the generality of the foregoing, modification of the Final Award by the Tribunal may include provisions for transferring the District entirely out of the territory of the non-complying entity and placing it within the exclusive control of the other.

IX. AUTHENTICITY

69. The English language text of this Final Award shall be the authentic text for all purposes6.

Robe B.Owen	Cazim Sadikovic	Vitomir Popovic
Presiding Arbitrator	Arbitrator	Arbitrator

5 March 1999

ANNEX

The Tribunal’s District plan contemplates that, on a schedule to be devised by the Supervisor,

the new Brcko District of Bosnia and Herzegovina will be established with the following features and characteristics (although the following proposals are subject to modification in light of any written comments received from interested parties within 60 days of the date of the Final Award of which this Annex a part). All implementation issues not addressed in this Annex shall be resolved by the Supervisor in consultation with the parties.

1. Status of District Residents

All residents of the District who are citizens of BiH shall have the right to elect to be also a citizen of one or the other entity (but not both), regardless of where they live in the District. No resident of the District shall be treated by either entity as being subject to entity taxes or compulsory military service. Any persons who return from the District to either entity shall be subject to entity taxes and military service only as provided by the High Representative. Bosniacs. Croats, Serbs, and Others shall be constituent peoples of the District.

2. The District Assembly

All legislative responsibilities within the District shall he vested in the District Assembly. The total membership, composition, and modality of selection or the Assembly shall be as specified by the Supervisor in the. Statute for District Government. This initial election of members of the Assembly shall take place when and as directed by the Supervisor, and subsequent elections shall take place as provided by enactment of the Assembly with approval of the Supervisor. If he deems it necessary, the Supervisor may devise and incorporate into the Statute (1) an “ethnic formula” designed to minimize the incentive for any ethnic group to seek to increase its population in the District in order to achieve exclusive political control, and/or (2) a provision for “vital interests” protection.

3. The Executive Board

The Supervisor may include in the Statute such provisions as may be necessary (a) to permit the day-to-day management of the Brcko District to be placed in the hands of a professional city manager (hereinafter “the District Manager”), and (b) to change the responsibilities of the Brcko Executive Board in such a way that it will serve as a body giving general policy guidance to the District Manager in accordance with enactments by the Assembly and the orders of the Supervisor. The Statute may incorporate an “ethnic formula” relating to Executive Board membership.

4. District Manager

If the Supervisor’s Statute provides for a District Manager, the latter’s essential function shall

be to provide municipal services as efficiently as possible to all citizens of the District without any ethnic discrimination whatever. In the Statute the Supervisor may incorporate an appropriate "ethnic formula" to ensure an appropriate distribution of jobs in the public sector among the various ethnic groups, It shall be the responsibility of the District Manager, once appointed, to ensure that all municipal employees are compensated (in terms of their total remuneration from all governmental and political sources) on an equitable basis and without favoritism based on membership in any particular ethnic group or political party.

5. Judicial and Penal System

The Statute shall specify the number of judicial posts at the trial and appellate levels, and the Supervisor shall make the initial appointments of (a) the members of the District Judiciary, and (b) the Prosecutor. Subsequent appointments shall be made by the Brcko Executive Board subject to the approval of the Assembly and the Supervisor. All such appointments shall be made in accordance with any "ethnic formula" specified in the Statute. All persons appointed to such positions must be professionally qualified.

Since the Tribunal considers that as a general rule persons sentenced to imprisonment should not be confined in prisons administered by the entities. the Supervisor and later the Executive Board will be responsible for procuring (e.g., by purchase or lease) prison premises to be administered by the Municipal Manager (if appointed). Persons sentenced to imprisonment shall be sent to entity prison facilities only with the Supervisor's approval.

6. Law Revision Commission

The Supervisor shall appoint a three-member commission with responsibility for proposing n modifications of existing laws to produce a uniform system of laws throughout the District. The commission shall be chaired by an international jurist and include a representative of the Federation and a representative of the RS, all of whom will be selected by the Supervisor. The commission's recommendations will be submitted to the Assembly for approval and thereafter be subject to the approval of the Supervisor. If the Assembly fails to act after a reasonable time, the Supervisor may himself render a decision on the commission's recommendations.

7. Law Enforcement

The Statute shall specify the structure of the District Police Department and shall provide for continuing IPTF guidance. The Chief of Police shall be appointed by the Brcko Executive Board with the approval of the Assembly and the Supervisor. The Statute may also provide for an appropriate "ethnic formula" covering the entire police force and staff. The Statute shall emphasize that the principal responsibilities of the District Police Force shall be, not only to

provide normal law-enforcement functions throughout the District. but also to ensure complete freedom of movement within the District with particular emphasis on freedom of movement both between the eastern arid western portions of Republika Srpska and between the Federation and Croatia.

8. Customs Service

The Statute shall provide for the establishment of a District Customs Service which shall, in accordance with current practice, collect duties at the border. The Supervisor is encouraged to ensure that the District Customs Service aggressively and effectively enforces BiH customs law throughout the District and in the "Arizona market". If appropriate. an "ethnic formula" may be employed in staffing the Customs Service.

9. Taxation and Financial Matters

After consultations with representatives of OHR, BiH, and the two entities, the Supervisor shall make provision in the Statute for an appropriate system of taxation within the District. Responsibility for the preparation of an annual District budget shall be that of the Brcko Executive Board (acting in consultation with the District Manager, if appointed), and the budget shall than be submitted to the Brcko Assembly and the Supervisor for approval. The budget should include an estimate as to how much revenue will be raised within the District. Any "short-fall" will be financed by the entities, two-thirds from the Federation and one-third from the RS, except as otherwise agreed or as directed by the Supervisor or his designee. Any necessary coordination of the financial affairs of the District with those of the entities shall be provided by the Supervisor or his designee for such purposes. See 43 of Final Award.

10. Voting

Every otherwise eligible resident of the District who is a citizen of BiH shall be entitled to vote (a) for the District Assembly; (b) for the BiH Presidency and the BiH House of Representatives by casting a ballot in the entity (if any) of which the voter has elected to be a citizen; and (c) in the elections of the entity of his or her choice. All such voting shall be in accordance with regulations to be promulgated by the Supervisor, and the conduct of the elections shall be supervised by OSCE.

11. Symbols

The District Assembly shall determine all symbols for the District, provided that all such symbols shall be politically and ethnically neutral and subject to final approval by the Supervisor. There shall be no specific flag for the District other than the flag of Bosnia and

Herzegovina. The flags of both entities may be flown within the District, but the flag of one entity will not be flown without the other being flown on essentially equal terms. Both the Latinic and Cyrillic alphabets will be used on essentially' equal terms for all official purposes. Any citizen of the District shall have the right to request the issuance of official documents in any of the three officially-recognized languages and shall have the right to use any such language in official and all other correspondence, The District government and the Supervisor shall be responsible for issuance of a District identification card.

12. Educational Curriculum

Each school within the District will continue to use its existing curriculum for the remainder of the 1999 academic year. As to subsequent years, the Supervisor will establish an Educational Committee with representation from all ethnic groups and appropriate BiH agencies and international community officials. The Supervisor will have final decision-making authority in such matters throughout the period of supervision, after which that authority will be in the hands of the Executive Board.

13. Public Properties

The Supervisor shall have authority (a) to transfer, as necessary, the ownership of public assets within the District from the entities to the District government, and (b) to establish a system of regulation for the operation of public utilities and. enterprises.

END

---

1 *See Award, 15 February 1997, and Supplemental Award, 15 March 1988, both of which are incorporated in this Final Award by reference*

2 It is to be noted that FRY President Slobodan Milosevic personally agreed at Dayton that the Brcko dispute should be resolved by this arbitration and guaranteed RS compliance. Since he has not taken the necessary action to achieve RS compliance, he too bears responsibility for the present result.

[3] The RS contended at the hearings that the reason that so few people left Brcko for the Federation was that Federation n authorities obstructed such returns. It is true that, according to UNHCR, return applications to the Federation have not been processed as efficiently as they should have been, but it is apparent that the flow from Brcko to the Federation could and would have been much higher if RS officials had acted to facilitate such returns.

4 The Tribunal is advised that there is a tendency for displaced persons, having lost their property and been uprooted from their homes, to feel insecure and hence to follow hard-line nationalistic party leadership that preaches the advantages of clinging together and resisting mixing with other ethnic groups. There is reason to believe, however, that when a displaced person is allowed to return, there is a tendency to move away from the

defensive hard-line political position toward a more tolerant and democratic outlook.

5 The authority of the entities to delegate their powers to any other lowfully existing institution is confirmed by BiH Constitution Article III(5)(a), Article IV(4)(e), and Article V(3)(i)

6 Pursuant to Article 32(4) of the UNCITRAL Rules, the Tribunal notes that the party-appointed arbitrators have not yet signed the Final Award, essentially because (as has become apparent through frequent communications throughout this arbitration) it is not possible for this three-person tribunal to reach a 2-I majority decision. As a result, “the decision of the Presiding Arbitrator will be final and binding upon both parties.” See Award 5.